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Third Circuit Holds Employee Injury Exclusion Applies to Bar Coverage for Individual Insureds Sued for Damages to Employee of Named Insured

In *Scottsdale Ins. Co. v. Easton*, 379 Fed. Appx. 139 (3d Cir. May 11, 2010), Scottsdale sought a declaration that it did not owe a duty to defend a city or two individuals for a civil rights action brought against them under a law enforcement liability policy issued to the city. The underlying suit was brought by a police officer's widow after the officer was killed by the accidental discharge of a weapon by another officer. The basis of the civil rights action was the deficiency or lack of safety standards with respect to the cleaning, loading and handling of firearms in police headquarters. The district court found against Scottsdale, but the Third Circuit reversed on appeal.

At issue was the employee injury exclusion, which provided that Scottsdale was not obligated to defend or indemnify suits or claims "made against the insured . . . for 'personal injury' or 'bodily injury' to: a. An employee of the insured arising out of and in the course of employment by the insured . . . . The exclusion applies: (1) Whether the insured may be liable as an employer or in any other capacity." Because the alleged injuries took place during the scope of the deceased officer's employment and the exclusion applied whether the city was sued as an employer or as a state actor, the exclusion barred coverage and the district court erred in denying Scottsdale's motion for summary judgment.

With respect to the individual defendants, the court likewise held that the employee injury exclusion barred coverage. The court rejected the argument that the language of the exclusion in conjunction with the separation of insureds clause prevented the exclusion's application to the individuals because they were not the deceased officer's employer. In so holding, the court relied on the Pennsylvania Supreme Court's decision in *Pennsylvania Mfrs' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 233 A.2d 548 (Pa. 1967), wherein an employee exclusion was held to bar coverage for an additional insured where the suit was brought by an employee of the named insured. "Under *PMA*, a separation of insureds clause like the one in this case does not modify the meaning of the word 'insured' in an employee injury exclusion to mean 'the insured seeking coverage' or 'the insured being sued.'" *Id.* at *28. Interestingly, the Third Circuit did not address the apparent conflict in interpretation of the phrase "the insured" between this and the *PMA* case versus the line of cases, including Third Circuit precedent, which provides coverage to an innocent co-insured under policies with an intentional acts exclusion that uses the phrase "the insured" rather than "an insured" or "any insured." In those cases, the courts have held that the intentional acts exclusion only applies if the insured being sued expected or intended the harm even if another insured acted intentionally to cause the injury at issue.

District Court Refuses to Apply Related Claims Provision or Prior Pending Claims Exclusion to Bar Coverage Where to Do So Would Result in Illusory Coverage

In *Hrobuchak v. Federal Ins. Co.*, 2010 U.S. Dist. LEXIS 112189 (M.D. Pa. Oct. 21, 2010), the plaintiff brought a class action alleging that the insured subjected her and the class to unlawful debt collection practices. The insured had a professional liability policy with Federal from October 29, 2007 through October 29, 2008. After the insured filed for bankruptcy, a judgment allowing proof of claim was entered by the bankruptcy court for $50,000 more than Federal's policy limits. The plaintiff then filed suit against Federal seeking, *inter alia*, a declaration that the Federal policy covered the underlying claims. Federal moved to dismiss. After determining that the plaintiff had standing to sue under 40 P.S. § 117, the court addressed Federal's substantive arguments. First, the court noted that the original class representative alleged that he was contacted by the insured shortly after he wrote a bad check on January 8, 2008, thus the alleged wrongful conduct took place during the policy period and the claim was reported during the policy period.

Federal also argued that the Related Claims provision barred coverage because the allegations in the class action related to claims made in suits filed prior to the policy period and related claims were to be treated as a single claim having been first made at the time of the first related claim. The definition for Related Claims was as follows:

> all Claims for **Wrongful Acts** based upon, arising from, or in consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events

The commonality of the suits at issue was stated to be that "all the suits allege that ACCS is debt-collection business that operates in conjunction with local district attorney's offices to run bad check diversionary programs and commit various abuses and wrongful acts in running these programs." The court refused to apply the Related Claims provision so broadly because the suits involved different time periods, different states, different plaintiffs and different agreements with district attorneys, and, "One suit over your business practices in one state does cannot [sic] mean that your insurer is forever immune from having to extend coverage in future suits." *Id.* at *12. For the same reason, the court held that the Prior Pending Claims exclusion and a broader exclusionary endorsement did not apply because to so apply them "would be to completely vitiate the purpose of the policy, i.e. the insuring of the administration of bad check diversion programs." *Id.* at *13. And, the court inquired, if all claims related to the insured's sole business were excluded, then what was being insured?

PSMN Obtains Summary Judgment As District Court Holds No Coverage Under Claims Made Policies Where No Claim Made and Potential Claim Not Reported During Policy Period

In *McMillen Eng., Inc. v. Travelers Indem. Co.*, (W.D. Pa. Sep. 30, 2010), the insured sought a determination of which of two of its insurers provided coverage for a demand for payment arising out of a slippage of lateral ground support for a state highway on a site where the insured provided engineering services for the Redevelopment Authority of Fayette County. McMillen had successive insurance policies with Travelers and Navigators, both of which were architects and engineers professional liability claims made policies. The Travelers policy defined a claim as "a demand for money or services, naming YOU and alleging a negligent act, negligent error or omission negligently committed in performance of YOUR PROFESSIONAL SERVICES on behalf of the Named Insured for others by YOU or any entity, including joint ventures, for whom YOU are legally liable." The Navigators policy had a similar definition of "claim."

On December 30, 2003, the insured was notified of a slide and authorized emergency work on the hillside. On February 5, 2004, a meeting regarding the slide took place where PennDOT took the position that the Redevelopment Authority should pay for the repair work as landowner. The following day, at the request of the Redevelopment Authority, the insured worked with PennDOT to develop a restoration plan. On February 11, 2004, PennDOT sent a letter to the Redevelopment Authority which put the Authority, the insured and another entity on notice that PennDOT considered them liable for the slide, but did not allege any negligence. The Authority forwarded the letter to the insured with direction to perform the required remediation. In November 2004, the Authority received a letter from Verizon alleging that it was liable for the cost of repairs to Verizon's underground lines, which had allegedly been damaged by the slide. Discussions and investigation ultimately took place with respect to what may have caused the slide without any allegation that the insured had been negligent. On July 25, 2005, the insured submitted its application to Navigators to replace the expiring Travelers policy without mentioning the demands. On September 20, 2005, the insured was served with a suit filed by Verizon, alleging, *inter alia*, negligence by the insured. Despite revising its Navigators application the day after service of the Verizon suit, the insured did not mention the Verizon complaint. After receiving the Authority's October 3, 2005 letter that forwarded PennDOT's demand for payment of over $300,000 in repair costs, the insured notified both Travelers and Navigators of the demand. Neither the Authority nor PennDOT ever alleged negligence by the insured as a basis for their demand that the insured reimburse PennDOT.

The court held that the demands for money did not constitute a "claim" because none of them, including the demand by the Authority, were accompanied by an allegation that the insured had been negligent. The court recognized that negligence is not always required for one to be financially liable to another and that the statute under which PennDOT sought to hold the Authority responsible only required land ownership and a failure of vertical or lateral support—no intentional, negligent or reckless conduct need be shown. Furthermore, the court noted that the Authority's position that it would not pay PennDOT's invoice but expected the insured to do could not constitute an inference of alleged negligence because the Authority's and the insured's relationship was one established by contract and Pennsylvania law does not allow a breach of contract claim to be turned into a tort claim for negligence where the contract is the gist of the action. Therefore, neither Travelers nor Navigators owed coverage.

Additionally, the insured failed to report a potential claim to Travelers in a timely manner. The Travelers policy required that any "pre-claim circumstance" had to be reported during the policy period. The plaintiff eventually reported to Travelers that it had received a demand for payment, but it did not do so until after the policy had expired. Therefore, the plaintiff failed to establish entitlement to coverage for any future claims that may arise because the relevant facts known by the insured prior to expiration of the policy were ones that a reasonably prudent professional might expect to give rise to a claim.

Finally, the court held that Navigators likewise did not owe coverage for any future claim related to the Authority's demand because the insured failed to disclose the demands on its application for coverage. The application asked for information regarding potential claims and gave notice that failure to report such circumstances would preclude coverage if a claim arose and the policy itself excluded coverage for claims that arose out of the insured's professional services where, prior to the effective date of the policy, the insured was "aware or reasonably should have been aware of an event, incident, allegation, circumstance, dispute or situation that . . . could reasonably be expected to give rise to [a] claim."